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No. 82-5840
In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

JOSEPH MILLER,
Petitioner,

-vs-

STATE OF ILLINOIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, 1ST DISTRICT

PETITIONER'S REPLY

Joseph Miller, pro se
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P.O. Box 112, N-01855
Joliet, IL. 60434

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JOSEPH MILLER,
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-vs-

STATE OF ILLINOIS,
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PETITIONER'S REPLY TO RESONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

In the Respondent's brief in opposition to petitioner's writ of certiorari, the respondent contends that, "[t]he trial court in this case, has already considered whether the state exercise its challenges improperly." (Resp. Br., at p. 4). The respondent further alleged that this court should not be asked to decide the issue, since it is currently being litigated in the Illinois Supreme Court, which is the respondent's contention that, "[t]his court should allow the Illinois Supreme Court the first opportunity to resolve that conflict. Hence, analysis of the facts of this case, shows clearly and convincing that petitioner has set forth a prima facie case of systematic exclusion and consequently a Sixth Amendment violation.

Hence, apparently, the respondent has overlooked the fact that the Illinois Supreme Court has had ample opportunity to settle the dispute between their intermediate appellate courts, but did not. When the court had upon review several cases to settle this dispute. For example, the First District, Fourth Division decision in People v. Vaughn, 100 Ill. App. 3d 1082, 427 N.E. 2d 840 (1st Dist. 1981) and the First District, First Division in People v. Clearlee, 101 Ill. App. 3d 16, 427 N.E. 2d 1005 (1st Dist. 1981). Nor when the Illinois Supreme Court had upon review at the same

time, People v. Mims, 103 Ill. App. 3d 673, 431 N.E. 2d 1126 (1st Dist. 1981), from the First District, Second Division and the First District, Fourth Division in People v. Lavinder, 102 Ill. App. 3d 662, 430 N.E. 2d 243 (1st Dist. 1981). Moreover, there are far too many others to mentioned at this particular time. Therefore, it is even more ludicrous for the respondent to try and lure this court under such an erroneous assumption. But, equally important is the fact that the Illinois Supreme Court had cases before them itself stemming from death penalty convictions in People v. Williams, ____Ill. 2d_____, _____ N.E. 2d_____ (1982) and more recently in People v. Davis, _____ Ill. 2d_____, ____N.E. 2d _____ (1983), hence, again the court declined to set forth any proper guidelines for either the trial court or the prosecutor to follow under the selection process in juror selection, and the use of the peremptory challenge.

In any event, this case is now before this Court and nothing or any ruling made by this Court will changed the fact that both the Illinois Appellate and Supreme Courts were given opportunities to decide this issue but did not, therefore, what this court can do is set forth guidelines for Illinois and other courts throughout the nation to follw. This is the ideal case, insofar as, not only are there conflicts within Illinois Courts, but also there exists conflicts between various other courts in the United States. Compare e.g., People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S. 739 (1981); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978); and Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499, cert., denied, 444 U.S. 881 (1979), with Com v. Henderson, 438 A.2d 951 (1981) and State v. Brown, 371 So. 2d 751 (La. 1979), accordingly, it is almost self-evident that Swain v. Alabama, 380 U.S. 202 (1965) precedent value has not been the proper guideline for courts in this jurisdiction as well as courts throughout this nation to follow.

Furthermore, the respondent cannot deny the fact that People v. Payne, 106 Ill. App. 3d 1034, 436 N.E. 2d 1046 (1st Dist. 1982), leave to appeal granted, No. 56907, currently before the Illinois Supreme Court to be decided is not as blatant as the instant case.

Compare statistical wise, in Payne, seven Blacks were available to be seated as juror during the voir dire. The prosecutor used peremptory challenges to exclude six of the Blacks. . . . Each objection was summarily overruled. After the prosecutor had excluded six of the Blacks and after defense counsel objected each time that the prosecutor was systematically excluding the Blacks solely because they were Blacks, the prosecutor allowed the remaining Black to become a juror. See, Payne, at 1041,42, 1053,54. Conversely, in comparison with the instant case where fourteen Blacks were excused by the prosecutor without cause, and none were actually allowed to sit on the jury. As a consequence, by comparisive measure, one would inescapably conclude that the prosecutor's abuse was far more blatant in the instant case, than what actually occurred in Payne.

Petitioner further submits for nearly eighteen years this Court has been guided by the standard enunicated in Swain as applied to today's standards of jury selection under the Sixth Amendment just does not cut the constitutional mustard to meet these standards of today.

This court as well as other courts have been relying upon the mischievous practice of Swain. In Swain, the court held that the prosecutor striking Blacks from the jury in this case, a state criminal trial, did not violate the equal protection clause of the 14th Amendment of the United States Constitution. This Court must be mindful however that Swain was decided on the 14th Amendment, whereas petitioner ask this Court to decide this case on the basis of the Sixth Amendment. In this regard, the 14th Amendment pertains only to the equal protection clause; conversely, the Sixth

Amendment which operate to guaranty the defendant to a fair trial and a fair and impartial jury, which petitioner submits are applicable in the instant case.

Hence, beside the fact that there exist a conflict in Illinois as well as other state courts' throughout the nation which clearly warrant intervention by this court, but more significantly, petitioner does not quarrel with the fact that Swain was decided on the basis of the 14th Amendment, petitioner however, ask this court to decide this case upon the basis of the Sixth Amendment and this Court's precedent decisions in Taylor v. Louisiana, 419 U.S. 522 (1975) and Duncan v. Louisiana, 391 U.S. 145 (1968), petitioner submit that these cases are controlling in the case at bar; not Swain.

Swain, had erroneously held that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes." 380 U.S., at 222. The practice of removing Blacks from the jury in that case was found insulated from inquiring "on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged." Id., at 223. However, the court conceded that it would consider an equal protection challenge to the procedure in some circumstances. Therefore this court should be mindful of the latter portion of the Swain holding when deciding this case.

If this is not a classic example of the court's holding and ideally for overcoming that insurmountable task than there ever was, insofar as, the guidelines are as interpreted under Swain, it would become almost impossible for a defendant to show a prima

facie case. Moreover, "petitioner submits however, that the standards articulated in Swain, supra, does not adequately protects a defendant's right to a petit jury selected from a fair cross-section of the community. . . [but more importantly] if Swain, supra, was before this Court now on certiorari [today], inescapably this Court would be compelled to reverse the Swain case especially in light of the recent decisions that have been decided after Swain, which strongly criticize the insurmountable guidelines established by that court." See, Pet. Cert.,at p. 13).

Petitioner believes that Duncan and Taylor together or singular have significant impact on the changed in the law prior to Swain being decided, that Sixth Amendment right of an accused in a state trial to a jury drawn from a fair cross-section of the community, and the prohibition of that State's from frustrating that right. This court must be mindful that at the time Swain was decided the 6th Amendment had not yet been recognized as applicable to state criminal trials, and the accused's 6th Amendment right to a jury drawn from a fair cross-section of the community and the prohibition of the Sixth's Amendment right were neither raised nor discussed in Swain. Moreover, the fact that the law has changed in the areas is demonstrated by this Court's holding that, "the Sixth Amendment right to a petit jury made applicable to the State • • • in Duncan (citation omitted), does not apply to state trials that took place before the decision in Duncan." See, Peters v. Kiff, 407 U.S. 493,96 (1972).

From all constitutional aspects, petitioner submits the framers of the Constitution made it clear when they established that the Sixth Amendment grant every criminal defendant "the right to an . . . impartial jury of the state. . . wherein the crime shall have been committed. . . ." See, U.S. Const. Amends. 6th. This Court has interpreted this right to mean inter alia that a petit jury venire must represent a fair cross-section of its community. Taylor, supra.

However, petitioner submits that once he has made a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross-section of the community, it is the state that bears the onus of justifying this infringement by showing attainment of a fair cross-section to be incompatible with a significant state interest. See, Taylor, at 533. Assuming, arguendo, that the exemption mentioned by the court below would justify failure to achieve a fair community that these exemptions caused the underrepresentation compliance of. The record here contain a substantial showing (prima facie) that petitioner was denied his constitutional right to a fair and impartial jury.

Finally, the respondent's contention in this event is erroneous, while really compounding this situation by misstating petitioner position. Petitioner defends his position wholeheartedly. Contrary to the respondent's contention, petitioner has never contended that this Court should totally abolish peremptory challenges altogether as the respondent alleges. See, (Resp. Br., at p. 31). This was not petitioner's position at all, for this Court or any other court to abolish the peremptory challenge altogether; as this itself would be a total denial of a fair trial, and consequently, petitioner would not benefit from this, but equally important, there would be no way of properly selecting a fair minded jury in any type of criminal proceeding.

In addition, petitioner does not deny the fact that the prosectuion should be made to explain his reasons when he has systemactically excused every Black juror without cause, nor does petitioner deny the fact that the trial court has the burden to inquire as to the prosecutor's motive. See, People v. Payne, supra, moreover, this right lies with the trial court, not with the legislature as was fallaciously interpreted by the court in People v. Teague, 108 Ill. App. 3d 891, 439 N.E. 2d 1066 (1st Dist. 1982). There-

fore, in one instant it petitioner belief that the respondent has erroneously mislead this Court on his position, and on the other hand that the respondent was correct, the prosecutor should be made to explain to the trial court when they have dismissed every Black juror on the panel without cause. In any event, petitioner agrees with the respondent that the "trial court in this case has already considered whether the state exercised its challenges improperly." (Resp. Br., at p. 4), however, that court ruling under the total prima facie showing made by petitioner, that ruling was of course subject to an abuse of that trial court's discretion, which warrant intervention by this Court.

C O N C L U S I O N

For the above reasons, petitioner ask that this court grant his petition for a writ of certiorari.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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1. Pursuant to Rule 33 of the Rules of the Supreme Court of the United States, I shall have cause on March 24, 1983, to filed in the United States Supreme Court the attached REPLY BRIEF.

2. I, Joseph Miller, being first duly sworn upon oath, deposes and avers that the foregoing are true and correct.

Joseph Miller
Affiant: Joseph Miller, N-01855
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Joliet, IL. 60434

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 23rd DAY OF MARCH, 1983
Stanley Bieniewicz
NOTARY PUBLIC
MY COMMISSION EXPIRES 5-22, 1985